A. Steven McMurray, and I think that he was the only one that asked me for those. That was --

Q. And when did they ask you for them? Well, when did Mr. McMurray ask you for them?

A. When this initially became an issue that we needed legal counsel.

Q. And do you know when that was? Do you have an approximate date?

A. I have no idea. I'm assuming it would have been back in sometime in 2005.

Q. Did Mr. Bybee call you as well?

A. Mr. Bybee had asked where everything for this file was prior to that, yes.

Q. Okay. So Mr. Bybee had asked you and Mr. McMurray had asked you for them?

A. Uh-huh.

Q. Anyone else?

A. Not that I recall.

Q. Okay. Let's -- let's see if you -- what you can remember about your conversation with Mr. Bybee. Was it in person or over the phone?

A. I believe it was just in person.

Q. In person? Was it at your office or his office?

A. At the Winterfox office.

Q. And did he call you to come meet with him?

A. No. It was -- if I remember correctly, it was just in discussion with several other dealings that we had. We --

Q. And who else was present besides you and Mr. Bybee?

A. Not -- I don't remember anybody being present.

Q. How about Marco? Well, obviously you were present and Mr. Bybee. What about Marco Fields?

A. Not that I remember. But we were doing a lot of business together in other realms as well, and so Marco -- there was a lot of us around all the time. So to pull out a detail like that, I just don't remember.

Q. Okay. Do you recall what -- what Mr. Bybee said to you? Well, first of all, do you remember when this was?

A. No.

Q. Do you remember if it was -- how close it was to the date the loan went into default, which would have been February 21 or, actually, after the --

A. It was after that.

Q. -- extension. Right.

A. Yeah. Maybe a month or two after that when we were deciding which direction to go, how -- how much longer to allow the permanent financing to take place.

Q. And you discussed what the documentation was; whether you'd crossed your T's and dotted your I's at that time? Something like that?

A. I don't remember having that detailed of a discussion, to be honest with you.

Q. What was the discussion, to the extent you can remember?

A. Where's the file, where are the documents, do we have the Deed In Lieu Of Foreclosure.

Q. Was there a discussion about the disclosures and notices under TILA?

A. Not that I remember.

Q. Okay. What about your discussions with Mr. McMurray? Over the phone or in person?

A. Over the phone.

Q. And do you have a recollection of when that was? I think you had said 2005.

A. Yeah. Probably in the same time frame.

Q. Okay. And what did he ask you?

A. Just for anything that I would have had that pertained to this file.

Q. And did he ask you specifically about the Deed In Lieu Of Foreclosure?

MS. BOULEY: Objection. Hearsay, Your Honor.

MR. AFFLECK: I'm not asking -- I'm asking what he was -- what question he was asked. It is not being offered for proof of -- of any -- there's no assertion. The question is did he ask you about the Deed In Lieu Of Foreclosure. I'm asking if he remembered him asking that question.

THE COURT: The objection's overruled.

THE WITNESS: Not specifically. Just anything to do with this file.

Q. (BY MR. AFFLECK) Okay. So but anything to do with the file, but nothing specific?

A. Correct. Any --

Q. In lieu notices and disclosures?

A. Were there any documents, disclosures that I for some reason had that wouldn't have been in the file. Just trying to gather all the documentation.

Q. Okay. At some point in time, did you review all of the documentation that the parties had collected relating to this loan?

A. Not in really any detail.

Q. So there was an assignment given or a request given to gather up these documents, you gathered them up and you gave them to -- you gathered up what you had, and you gave it to Fabian?

A. Actually, I didn't have anything.

Q. You didn't have anything?

A. It was all in one location.

Q. And where was that?

A. In the safe in Winterfox.
Q. Okay. Did you go to that safe and pick up the documents?
A. I didn't.
Q. Did you -- were you ever shown what was in the safe?
A. No.
Q. Did you ever discuss with anyone what was in the safe?
A. Only that's where our documents were.
Q. Have you had a chance to review the documents, the alleged disclosure documents, Exhibit 7 and 8?
A. I believe the only time I'd seen them was at the deposition.
Q. So you never discussed these with --
A. I may have seen them prior to that, but not in detail.
Q. Have you ever discussed these disclosures with Marco, Evan, or any attorneys with Winterfox?
A. Not in detail. We had gone through the note, the reason for the loan. Other than that, the disclosures and things I wasn't real in depth.
Q. Have you seen disclosures like this before in connection with loans?
A. Yes.

Q. And what's your understanding of the purpose of these disclosures like this?

A. To verify to the borrower basically what they're signing so they can have some time to look over the -- the parameter of the loan.

Q. And have you had a chance to look over these documents in relation to the loan that was given by Winterfox to Mr. Kitts?

A. Again, only at the deposition was when I saw those.

Q. If you'll turn to Exhibit 7, Winterfox No. 10. This is one of the disclosure notices, it's entitled. This is part of what would normally be disclosed in a Truth In Lending disclosure statement?

A. Yes, in a Truth In Lending. In a residential mortgage, yes.

Q. Okay. And I notice it includes an Affidavit of Occupancy and it checks primary residence. Do you know who checked that or prepared this statement?

A. I would just assume it was Marco.

Q. And did they do it with information from you?

A. They would have done it off of information off of the application, Uniform Loan Application.

Q. So the loan application would have -- now, the loan application we don't have. Right?

A. I haven't seen it.
Q. We don't have -- we don't have it.
A. Okay.
Q. And you had it, but you don't know where it is right now?
A. It was with the file at some point.
Q. Okay. So what you're saying is this disclosure probably would have been -- or would have been prepared off of that information sheet acknowledging that it was a primary residence?
A. Yes, sir.
Q. You testified that you visited the Kitts home before the loan was done to verify the value of the home for purposes of making the loan. I imagine at that time you spoke with Mr. Kitts?
A. Yes.
Q. Isn't it true that besides that visit, you never spoke with Mr. Kitts other than that visit?
A. No.
Q. When else did you speak with him?
A. On several occasions.
Q. Before the loan or after the loan?
A. Both before and after.
MR. AFFLECK: No further questions, Your Honor.
THE COURT: Are there questions for the witness?

MS. BOULEY: Yes, Your Honor.
THE COURT: Counsel.

CROSS EXAMINATION +

BY MS. BOULEY:

Q. Good afternoon, Mr. Olivarez.
A. Hello.
Q. Hopefully you can hear me.
Did you act as a go-between between the borrower, Mr. Kitts, and Winterfox as the lender?
A. No.
Q. Were you licensed as a mortgage broker in December of 2004?
A. I was licensed as a loan officer, yes, which -- working for a brokerage in 2004.
Q. And your license was with Citywide. Correct?
A. Yes.
Q. Do you recall what pre -- what pre-approvals Michael Falk had?
A. Yes. There were several. I remember one from Countrywide, another from a sub-prime lender. I think it was Accredited. There was two or three others that I don't really remember. Just that he had a -- several pre-approvals.
Q. Did you actually see pre-approval documents or did he just tell you about them?

A. No. I saw them.

Q. Do you remember the terms of any of those pre-approvals?

A. The ones that stood out were -- was, obviously, the one from Countrywide because they're a reputable company, and it was very straightforward. Jumbo loan. Don't remember the percentage rate, but a 30-year term.

Q. Do you remember the amount?

A. Seemed like it was a million four and some change, but it could have been higher than that.

Q. If Mr. -- if Mr. Falk had these pre-approvals, why was the Winterfox loan necessary?

A. Because the property was in default and needed to be paid off before it was actually foreclosed upon.

Q. So were those conditions of all of these pre-approvals?

A. The -- well, that it was not in foreclosure? Is that what you're asking?

Q. Yes.

A. Yes.

Q. So the pre-approvals that Michael Falk had could not -- those lenders were not willing to lend while the property was in foreclosure. Is that correct?

A. It seemed like a couple of them were, in fact, willing. The -- the Countrywide and Accredited, they needed -- it needed to be out of foreclosure. But the time frame simply was not enough, and so that's why we were called upon to put the loan together; because the lenders had not acted quickly enough. And so, to my knowledge, that was the reason that we needed to act on it so quickly.

Q. But you don't recall who those other lenders are?

A. I don't.

Q. Or were. I'm sorry.

A. Yeah. I don't. I'm sorry.

Q. Do you know if those other lenders had any conditions associated with their pre-approvals?

A. Just basic conditions that, you know, clear title, appraisal, things that would go along with virtually any loan. Or any mortgage loan.

Q. So the other lenders whose names you can't recall also required or were requiring that the title be clear before they were willing to lend. Is that true?

A. From the foreclosure, yes. Well, excuse me. The two -- the two would not do it while it was in foreclosure. The other lenders would actually come in and do the refinance, but there just wasn't the time before the property was actually foreclosed upon.

Q. What is your understanding of what the purpose of the -- of the loan from Winterfox was?

MR. AFFLECK: Objection. Foundation and relevance.

MS. BOULEY: Your Honor, I think, you know, one of the major issues in this case is the purpose for which the loan -- the Winterfox -- the loan from Winterfox was acquired, so I think it's relevant on those grounds. I'm happy to lay some foundation.

THE COURT: Would you, please.

MR. AFFLECK: Your Honor, might I address that issue just for a moment? I don't think the issue of Mr. Olivarez's understanding is relevant. I think what is relevant is whether it was for a consumer purpose or a business purpose. Not what he understood. And that's what I'd like to say.

THE COURT: That portion of the objection's overruled, but you may lay a foundation.

MS. BOULEY: Thank you, Your Honor.

Q. Mr. Olivarez, did you have any discussions with Michael Falk or Mr. Kitts or anyone about the reason Mr. Kitts wanted a loan from Winterfox?

A. Yes.

Q. What did Michael Falk tell you was the reason that Mr. Kitts needed the loan?

MR. AFFLECK: Objection. Hearsay.

MS. BOULEY: We're offering it not -- not to prove the truth of the matters asserted, Your Honor, but to show what Mr. Olivarez's understanding was at the time, you know, what he was -- what assumptions he was operating on based on what he was told the purposes of the loan were for. It's not hearsay.

MR. AFFLECK: And, Your Honor, I would assert that the truth of the matter is the importance of the question. Mr. Olivarez's understanding is not controlling in this case. What is controlling is whether it was a consumer loan or a business loan, and what somebody told him about that fact is hearsay. Unless this Court, I think, determines that Mr. Olivarez's understanding is relevant to the question, I believe it is irrelevant and it is being offered simply for the truth of the matter asserted.

THE COURT: The objection's overruled. The witness may answer.

THE WITNESS: My understanding, and what I was told and the reason we ultimately did the loan, is -- there were two reasons. One, to save the property from being foreclosed upon and, two, were to give Mr. Kitts business capital so he could get over whatever hurdle he had in front of him, and it opened up several doors to have this capital, and that's why we did the loan.

Q. (BY MS. BOULEY) When you went to the property in late November of 2004, did it appear to you that Mr. Kitts was running his businesses out of the property?

A. Yes.

Q. What did you observe?

A. A home that he not only lived in, but the -- the -- his offices were set up there as well as his wife's training facility above the garage. They had just added on so she could run her personal training business from the home.

MR. AFFLECK: Objection. Lack of foundation. Move to strike as to why things were done. I don't know that this witness is doing anything but speculating.

THE COURT: I'll allow you to lay a foundation.

Q. (BY MS. BOULEY) Mr. Olivarez, when you went to the home, what led you to believe that there was business being conducted out of the home?

A. Two things. First of all, I was shown the addition that now allowed Mrs. Kitts to be able to run her personal training at home. And, secondly, in the middle of the home, as you walk in, was a large office area where Brian specifically told me this is where he officed out of.

MR. AFFLECK: Again, Your Honor, not as to the office question, but as to the gym question, lack of foundation, move to strike.

THE COURT: Well, I'll allow Ms. Bouley to continue to lay a foundation.

Q. (BY MS. BOULEY) Mr. Olivarez, how did -- what information did you have at the time to suggest that

Mrs. Kitts was operating a business out of the facility over the garage?

A. They told me all the money they had put into remodeling the facility for her to be able to do that there and the equipment that they had purchased to make it a first-class gym.

Q. What did the gym look like?

A. A small version of something you'd see in a commercial gym. I mean, it was a several hundred square feet that was laid out exactly like a gym with the flooring that a gym would have, really nice gym equipment. That's -- that's why it was a gym.

Q. Did Mr. or Mrs. Kitts or anyone tell you that Mrs. Kitts worked as a personal trainer, personal fitness trainer?

A. Yes.

Q. And did they tell you that she worked out of her home out of this gym in the home?

A. Yes. In fact, when I was there, she actually had a client there.

Q. Originally did you contemplate that there would be two loans from Winterfox or just one?

A. Just one.

Q. Now, I believe you explained earlier in your testimony that the reason for the second loan was that there was a shortfall in the payoffs for the -- in connection with the first closing. Is that correct?

A. Correct.

Q. And were you paid for your consulting work on the loan for Winterfox?

A. Yes.

MR. AFFLECK: Objection. Assumes facts in evidence that he was a consultant and not something else.

THE COURT: Would you rephrase, please.

MS. BOULEY: Certainly.

Q. Mr. Olivarez, what were you paid for in connection with the loan from Winterfox?

A. For consulting and the assistance in processing the loan.

Q. Was it urgent that the loan fund right away?

A. Yes.

MR. AFFLECK: Asked and answered.

THE COURT: I'll allow the witness to answer.

THE WITNESS: Yes.

Q. (BY MS. BOULEY) Did Mr. Kitts seem very anxious to get the loan funded as quickly as possible?

MR. AFFLECK: Objection. Foundation.

THE COURT: Sustained.

Q. (BY MS. BOULEY) Were you present at the closing on December 8th?

A. Yes.

Q. Was Mr. Kitts there as well?

A. Yes.

Q. Did he indicate to you that it was important that the loan fund as quickly as possible?

A. Yes.

Q. Did he tell you why?

MR. AFFLECK: Objection. Hearsay.

THE COURT: Overruled.

THE WITNESS: Yes. The -- the property was in fear of being foreclosed and taken.

Q. (BY MS. BOULEY) Do you recall Mr. Kitts executing a Deed In Lieu Of Foreclosure at the time of the first loan on December 8?

A. You know, I don't remember exactly when that was executed. I know there was one executed. I had originally thought there was one executed at the time of closing, but the only documentation I've seen was much later.

Q. So do you recall seeing a Deed In Lieu Of Foreclosure at the time of closing on December 8th?

A. Again, my procedure was to make sure that there was one there, but I don't recall actually physically seeing it and seeing it being -- be signed.

Q. So is it fair to say you don't know if a Deed In Lieu Of Foreclosure was signed --

A. Yes.
Q. -- on December 8?
Are you aware of any other Deeds In Lieu Of Foreclosure that were signed by Mr. Kitts other than the one that you've been shown today?
A. No.
Q. Did Winterfox obligate you in any way to share part of your fee with Marco Fields, or was that your decision?
A. No. That was my decision.
MS. BOULEY: May I have just a second?
THE COURT: You may.
Q. (BY MS. BOULEY) And, Mr. Olivarez, do you consider that you acted as a mortgage broker in connection with the Winterfox loan?
MR. AFFLECK: Objection. Calls for a legal conclusion.
THE COURT: The objection's overruled.
THE WITNESS: Not in any way.
Q. (BY MS. BOULEY) I'm sorry. What?
A. No. No. Not at all.
Q. Okay. And why is that?
A. A mortgage broker is someone, in my understanding, that would go find, originate, and shop a loan. I wasn't doing any of that. The loan was brought to us, and I was merely scrubbing it down to see if it was a good risk to

take or not.

Q. All right. Thank you.

No further questions at this time.

THE COURT: Thank you. Mr. Affleck, do you have anything further of this witness?

MR. AFFLECK: Yes.

REDIRECT EXAMINATION +

BY MR. AFFLECK:

Q. Now, all the loan documents were prepared in Brian's personal name. Right?

A. As far as I know, yes.

Q. And the loan was with Brian individually?

A. Yes.

Q. And the trust deeds that were prepared, based on the information you gave, indicated that Brian was the owner of the property. Correct?

A. Yes.

Q. And you knew that Mr. Kitts lived there. Right?

A. Yes.

Q. And you knew he was about to lose the house in a foreclosure proceeding. Right?

A. Yes.

Q. And you knew he needed to get the loan refinanced quickly or he would lose his home. Right?

A. Correct.

Q. And you knew that the foreclosing liens included Wells Fargo, which was a personal loan, Washington Mutual, which was a personal loan, and Ed Ingram, which was a lien for an addition to the home. Right?

MS. BOULEY: Objection. Assumes facts not in evidence.

THE COURT: Counsel, I'm going to sustain that.

Q. (BY MR. AFFLECK) You knew the -- you knew the liens that were foreclosing were Washington Mutual, Wells Fargo and Ed Ingram. Right?

A. Yes.

Q. And do you recall your -- did you have an understanding of who was obligated under those loans?

A. Who was obligated?

Q. Correct.

A. Brian himself.

Q. Okay. Now, you said that Michael Falk told you that the purpose of the loan -- told you what the purpose of the loan was. Did Michael Falk tell you where he got his information?

A. I was told by more than Michael Falk what the purpose of the loan was.

Q. Well, you were asked what Michael Falk told you.

A. Okay.

Q. I'm asking: Did you ask him where he got his information or did you just take his word for it?

A. When this -- I got his -- I got the information, when I asked him, from Brian, and he continued by putting Brian on a call with me so I could confirm the information.

Q. So your -- your response was, then, that the purpose of the loan was, number one, to save the property and to provide business capital to get over a hurdle.

A. Right.

Q. Now, save the property I understand. Business capital to get over a hurdle, what was the discussion about that?

A. Who knows what the hurdle was. It's -- my understanding was is that he had a business that he needed some capital to finish a project and --

Q. And what was the business?

A. Some type of business taking other businesses public.

Q. And how much capital was needed?

A. That I don't recall.

Q. Well, how much was necessary as part of this loan to get him over that hurdle?

A. We would have to go through the documentation, because we drilled down on exactly what he needed, and whatever did not go to saving the home would have been going to Mr. Kitts.

Q. But isn't it true that the reason that you needed the second loan is because the first loan wasn't enough to pay off the foreclosing liens?

A. The title company did not have the right information for the -- for the payoffs. Correct.

Q. So the -- so the money in this case, from the Winterfox loan, was necessary to pay off liens; not for new capital, was it?

MS. BOULEY: Objection. Foundation.

THE COURT: Objection's. Overruled.

THE WITNESS: I don't know how much went into Mr. Kitts' pocket.

Q. (BY MR. AFFLECK) Well, you know that when you refinance a loan usually the lender wants to make -- the new lender wants to make sure the old liens are paid off first. Right?

A. Correct.

Q. And there wasn't enough money to pay off the liens from the Winterfox loan, was there, the initial loan?

A. Correct.

Q. And that's why the second loan needed to be made?

A. Correct.

Q. And it was made in the amount necessary to pay off the -- was it the Wells Fargo, remaining Wells Fargo lien, is that what you testified, or was it --

A. Without going to those documents and seeing what --

Q. Well, whatever the lien was. Wells Fargo, Washington Mutual, whatever the lien was, it was to pay off the remaining liens on the property?

A. Correct.

Q. Now, when you worked at Citywide, did you consider yourself a mortgage broker?

A. Yes.

Q. And you testified that you were a licensed mortgage broker. You held a license. Correct?

A. Correct.

Q. And it was you who facilitated the contact between Michael Falk and Brian Kitts on one side and Winterfox on the other. Is that correct?

MS. BOULEY: Objection. Misstates testimony.

THE COURT: I'll allow the witness to answer.

THE WITNESS: No.

Q. (BY MR. AFFLECK) Without you, how would Winterfox have been able to find out about this loan opportunity?

A. I did not solicit or go --

Q. Did Michael Falk solicit you?

A. Yes.

Q. And then you contacted Winterfox?

A. By this time I was already working with Winterfox. I didn't --

Q. And Michael Falk contacted you, did he not, and say have you got a loan, have you got someone that can make a loan to Brian Kitts?

A. Yes.

Q. I've got a good borrower?

A. Yes.

Q. And you said yes, I've got a lender?

A. No. I told him that I was working with a lender.

Q. But you're not employed by Winterfox; you were working with them in the context of what you would call a -- as a consultant. Right?

A. That would be correct.

Q. And you get paid when you consult about a loan that funds?

A. Correct.

Q. And in this case you got paid the exact amount that Mr. Falk got paid for him acting as a mortgage broker. $12,500. Is that right?

MS. BOULEY: Objection. Foundation.

THE COURT: The objection's overruled.

Q. (BY MR. AFFLECK) Now, you drafted the contracts. Right?

A. Yes.

Q. Or, at least, you provided all of the information to draft the contracts. You obtained the pre-comparable sales on the borrower's home and evaluated the value for Winterfox. Right?

A. No.

Q. I thought you looked at the property to determine whether it had the value to support --

A. I did, but you asked about comparables.

Q. Okay.

A. Those were provided to me. I didn't pull comparables.

Q. And isn't it true that Marco Fields provided those and got those?

A. My understanding was is they were provided by Mike, Michael Falk, in the appraisal.

Q. Okay. So you evaluated those, at any rate; they were given to you, and you evaluated them for Winterfox?

A. Yes.

Q. You took the borrower's loan application, you received the package from Mr. Falk. Right?

A. I did not take a loan application, meaning I did not fill it out. I was given a loan application.

Q. You were given a loan application to consider?

THE COURT: Sir, I need an audible response. I need you to say your answer rather than shake your head.

THE WITNESS: Oh. I -- okay.

Q. (BY MR. AFFLECK) Did you say yes?

A. What did I not answer? You asked me if I took a loan application. I said no.

Q. But you reviewed the loan application that was given to you by Mr. Falk?

A. Yes.

Q. And you facilitated the title insurance for Winterfox. Right? You arranged for that?

A. The title company was pre-arranged. I did not -- I was told who we were working with.

Q. You've supplied the information to the title company to get the title report; that was part of your responsibilities, wasn't it, for Winterfox? Isn't that what you testified to?

A. Generally, yes.

Q. And did you do so in this case?

A. I was already given a title report on this home.

Q. Title policy. I'm sorry.

A. The title policy, yes. We -- we I did request that.

Q. Okay. Thank you. And you did review the title report for Winterfox as well --

A. Yes.

Q. -- to look at title issues?

And in spite of all of that, you maintain that you were not a mortgage broker. Is that correct?

A. No.
Q. And the basis of your opinion --
A. Yes, that is correct. I maintain that.
Q. Well, okay. Yes.
A. I did not go shop this loan, I did not -- I was not a broker in this.
Q. I do understand that.
And your basis for determining that you are not a broker -- you have an opinion as to what a broker is and what a broker isn't. Right?
A. Sure.
Q. And what is that opinion based on?
A. Both in the mortgage licensing that I needed to do, you come to learn what a broker is, and a broker -- I was not acting as a broker.
Q. Okay. So your -- your opinion stems from some legal training that you got in getting your broker's license?
A. State of Utah training for and registration for the mortgage licensing.
Q. In -- in the trial brief that was submitted by Winterfox in this case, they discuss a case called Hodges vs. Kuhns Pontiac -- or Kuhns Buick Pontiac GMC. I want to read you a section of that and ask you to comment on it.
"In Hodges the Court looked at the plain and

ordinary meaning of mortgage broker after recognizing that TILA does not define the term. The party alleged to be a mortgage broker in Hodges was a certified mortgage broker who contacted both parties to the transaction to discuss information necessary to complete the contract. She then drafted the contract. She obtained pre-comparable sales analysis on the borrower's home, she took the borrower's application and ordered an appraisal on his home which was the property that secured the loan. The title insurance company sent the title insurance commitment and invoice to her attention. Based on all of these activities, the Court found that she was a mortgage broker because she performed all of the duties she usually did in her capacity as a mortgage broker." And then the next sentence, "By contrast, Aaron Olivarez's involvement in the bridge loan was as a paid consultant."

Now, based on what I just explained from Winterfox's brief, do you see any distinction between you and the broker in Hodges?

MS. BOULEY: Your Honor, we'd object to this question. It calls -- it's basically just legal argument and it's calling for a legal analysis and opinion from a fact witness. He can be asked about facts, but he should not be asked to comment on a legal opinion.

MR. AFFLECK: Your Honor --

THE COURT: Well --

MR. AFFLECK: -- may I respond to that?

THE COURT: You may.

MR. AFFLECK: When the question was asked to Mr. Olivarez are you a mortgage broker, I objected on the grounds that it was a legal conclusion. That objection was overruled. The question was asked and answered. I think the door is open to explore his -- the basis of his -- what I would -- what I would agree with Ms. Bouley is a legal opinion.

THE COURT: Do you have anything further?

MS. BOULEY: Yes, Your Honor. This is -- I think this is a different situation. Mr. Affleck is quoting from a case that Mr. Olivarez has not had an opportunity to see or review, and Mr. Olivarez is not an attorney and he's not here to offer a legal argument. That's more appropriately saved for closing.

THE COURT: All right. The objection's overruled. I think the portion of the opinion that's been read into the record contains a number of facts. If the witness can distinguish those facts, that's a factual determination.

You may answer the question.

Q. (BY MR. AFFLECK) Do you see anything that distinguishes what you did for Winterfox from what the broker in Hodges did in that case?

A. A small portion. But you could also relate that to a processor, an underwriter, a title officer, an appraiser. Any of these people.

Q. And in this case, the Court determined that those activities made that person a broker.

A. In this case I was brought all of those things. I was working on the behalf of Winterfox.

Q. Okay. Let's go through those facts just one more time. The broker in Hodges was a certified mortgage broker. Yes or no?

A. Correct.

Q. The broker in Hodges contacted both parties to the transaction to discuss information needed to complete the contract. Yes or no?

THE COURT: I'm sorry. Mr. Affleck, I think your questions are very vague. You're stating something. Are you asking a question, then, of this witness?

MR. AFFLECK: Yes.

THE COURT: After the statement?

MR. AFFLECK: Yes.

THE COURT: What is -- other than just yes or no, what is it you're asking?

MR. AFFLECK: Okay.

Q. Did you contact both parties to the transaction to discuss information needed to complete the contract? Yes or no.

MS. BOULEY: Objection, Your Honor. Asked and answered.

THE COURT: The objection's overruled.

You may answer.

THE WITNESS: Again, an underwriter at Countrywide would need to --

Q. (BY MR. AFFLECK) If you would just answer the question --

A. -- contact --

Q. -- yes or no.

A. Contact -- yes. I asked for things from Brian.

Q. Okay. Did you draft the contracts?

A. I drafted the note. Or excuse me. The loan agreement.

Q. And isn't it also true that you -- at least in your deposition you said you drafted the note, and in your testimony today you indicated that you supplied all the information to someone else to complete the contract?

A. Does a broker --

Q. I'm just asking if you did or didn't.

A. Okay. Yes.

Q. Did you obtain pre -- a pre -- did you conduct a pre-comparable sales analysis on the Debtor's home? Did you evaluate the value of the home?

A. Yes.

Q. Did you take the borrower's application?

A. No.

Q. But you did review it?

A. I reviewed it.

Q. The application was taken by Mr. Falk, you would say --

A. Correct.

Q. -- and then given to you?

You didn't order an appraisal on the home because none was ever ordered. Right?

A. Correct.

Q. But you did go --

A. It was ordered. I saw someone else's appraisal that was for the primary financing, the long-term financing.

Q. That was done in connection with getting the long-term financing, not this loan?

A. Correct. But it was a viable appraisal that I could look at.

Q. Okay. But you did evaluate the value of the home with your site visit?

A. Sure.

Q. And with respect to title insurance, you were the one who communicated with the title insurance company to make sure that title insurance was obtained for Winterfox.

Correct?

A. Correct.

MR. AFFLECK: No further questions.

THE COURT: Do you have anything further of the witness?

MS. BOULEY: Yes, Your Honor.

THE COURT: All right.

RECROSS EXAMINATION +

BY MS. BOULEY:

Q. Mr. Olivarez, isn't it true that you were told by Marco -- by Michael Falk that the property had been leveraged and money put in the businesses, and that was the reason for the Washington Mutual and the Wells Fargo loans?

MR. AFFLECK: Objection. Hearsay.

MS. BOULEY: Your Honor, I'm offering it, you know, again, this was before -- it's not -- not hearsay. It's being offered to show what Mr. Olivarez understood, what he was told and the assumptions that he was relying on in evaluating this loan for Winterfox.

THE COURT: All right. The objection's overruled.

THE WITNESS: Yes. I understood at least one of those were for business purposes.

Q. (BY MS. BOULEY) Okay. And do you remember -- you had your deposition taken last Spring. If you could please turn to page 53 of your deposition. Just down at the bottom of page 53 starting with line 19. I'm just wondering if you recall this. You were asked, "And do you know what money that was used, what the loan was -- what that loan was obtained for?"

"Q If you don't know --

"A I really don't. My -- what I was told back then" --

MR. AFFLECK: Objection, Your Honor. I don't think it's the proper use of a deposition to testify for the witness. This isn't cross -- this isn't a real Cross Examination. This is an agent of Winterfox. The deposition is being read as if we were putting on here's what you testified before, let's talk about that. Let's hear what he has to testify about now, and if she wants to cross examine his testimony, she may do so; but this is not a real Cross Examination. This is simply reading a deposition into the record for the purpose of getting on affirmative evidence.

MS. BOULEY: Your Honor, I want to help clarify Mr. Olivarez's testimony. It's different than what he -- than the way he just answered the question.

THE COURT: All right. So is this impeachment?

MS. BOULEY: Yes.

THE COURT: Objection's overruled.

Q. (BY MS. BOULEY) So, Mr. Olivarez, continuing on, "What I was told back then was that the home had been leveraged and money put into the businesses, and that's why a first and second."

MR. AFFLECK: Objection. Hearsay. Move to strike.

THE COURT: Objection's overruled.

MS. BOULEY: And then continuing onto the next page on 54 -- well, I'll -- I'll stop there.

Q. So, Mr. Olivarez, do you -- do you recall that you were told that the -- both the Washington Mutual and the Wells Fargo loans were -- were needed because the property had been leveraged and money put into businesses?

MR. AFFLECK: Objection. Hearsay.

MS. BOULEY: Your Honor, it's, again, offered to show his understanding at the time.

THE COURT: All right. The objection's overruled.

THE WITNESS: Yes. That's -- that's what I understood.

Q. (BY MS. BOULEY) Was it your understanding from Michael Falk that all of the liens were tied into business stats, and that's why you were doing the loan for Winterfox?

MR. AFFLECK: Objection, leading. Objection, hearsay. Objection, relevance.

THE COURT: The objection is leading. Are you claiming this is a hostile witness?

MS. BOULEY: I'm -- I believe that this is Cross Examination for me since they have called this witness as part of their main case.

THE COURT: All right. And this is not one of your witnesses, will not be one of your witnesses. Is that correct?

MS. BOULEY: He's on -- he's on our may-call list.

THE COURT: The objection's overruled.

THE WITNESS: My understanding that there was a tremendous amount of money that was leveraged against the house, and I would need to go back and look exactly what liens were in place. But, yes, the majority of the debt I understood to be, if not all of it, to be business oriented.

MS. BOULEY: Okay.

No further questions right now, Your Honor. Thank you.

THE COURT: Do you have anything further, Mr. Affleck?

MR. AFFLECK: Yes, Your Honor.

REDIRECT EXAMINATION +

BY MR. AFFLECK:

Q. Mr. Olivarez, I am confused by your testimony. Early on in the, I guess, Recross Examination you answered a question from Ms. Bouley and indicated that it was your understanding that one of the loans was for business purpose. Do you recall testifying that?

A. I said at least one of them was for business purpose.

Q. And which one was that?

A. At least the second. I don't know without going back and looking for sure.

Q. What investigation did you do to determine that?

A. I was just told by --

Q. By Michael Falk?

A. And Brian Kitts that there was -- the house had been leveraged. To my understanding, at one point he owned the home free and clear, and so there was money that was taken out to put into the business. Was it all taken out to put into the business?

Q. You don't know, do you?

A. That's what I was told.

Q. You were told that it was all taken out -- all the money that was taken out and that -- that this home was encumbered by business loans?

A. Well, they were residential loans, but the proceeds were used for business.

Q. And you're basing that testimony on what Michael Falk told you?

A. Michael and Brian.

Q. And your testimony is that Michael and Brian told you that all of the loans on the property were -- arose from a business context?

A. Correct.

Q. And when did they tell you that?

A. At some point during the --

Q. Was it over the phone --
A. -- underwriting.
Q. -- over the phone or in person?
A. I don't recall.
Q. Was it at the meeting where --
A. It could have been. I know with Michael it was discussed several times on at least two occasions.
Q. Was it on the phone or in person?
A. Both.
Q. Was there anyone else present?
A. Tom Adams.
Q. And he's passed away. Anyone else?
A. Not that I know.
Q. Did you do anything to verify this information or just take Michael Falk's or Brian Kitts' word for it?
A. I think we took Michael and Brian's word for it.
MR. AFFLECK: No further questions.
THE COURT: Anything further of this witness?
MS. BOULEY: No, Your Honor.
THE COURT: All right. Sir, you may step down.
THE WITNESS: Thank you.
MR. AFFLECK: Russell Walker.
THE COURT: Sir, would you come forward and be sworn, please.
(Witness is sworn.)

THE CLERK: Please take the witness stand and state your name and spell it for the record.

THE WITNESS: Russell Walker, W-a-l-k-e-r.

DIRECT EXAMINATION +

BY MR. AFFLECK:

Q. Mr. Walker, you represent Brian Kitts. Correct?

A. Yes.

Q. You're his lawyer right now, aren't you?

A. Correct.

Q. And you were his lawyer in this bankruptcy before -- or you are still his lawyer in this bankruptcy. Is that correct?

A. That's correct.

Q. And you were the one who assisted him in filing this case. Right?

A. Yes.

Q. You recall making a demand for information regarding the loan at issue in this case from Winterfox?

A. Yes, I do.

Q. And when was that?

A. Well, I think we filed the case, as I recall, in about April of 2005. The issue came up at the meeting of creditors, and I think it was several months later near the end of the year, probably, in 2005 I had requested specifically the truth in lending disclosures in several conversations with Mr. Jubber.

Q. And Mr. Jubber, is it your understanding that he was representing Winterfox?

A. Yes.

Q. What exactly, if you can remember, did you ask for?

A. Well, at that time we had taken a look at the loan documents it seemed, the deed in lieu of foreclosure and seen the other documents, that we were investigating whether or not there was a truth in lending violation claim, and I had spoken with Mr. Jubber in person several times and over the phone. I think we had several conversations, in which I had requested copies of those disclosures.

Q. And what was his response to you?

A. I think the first time I asked him, his response was, "I'll check with my clients and see," and then later he called me back and said yes, they had disclosures, and I said, "Can I get a copy of them?"

Q. And when was this? When did this conversation take place?

A. I'm guessing -- I don't have the exact date, but it was probably late 2005. I think, Your Honor, there's a letter in the file dated March 15, 2006, which I sent to Mr. Jubber, and it references, I think it's several months ago, I had requested copies of the documents. And so I would place it sometime Fall of 2005.

Q. Hold on just for a minute, Mr. Walker.

If you would look at Exhibit 9.

A. I have it.

Q. Is that your signature at the back of this exhibit?

A. Yes. I wrote this letter.

Q. And did you deliver this letter to Mr. Jubber?

A. Yeah. I had a runner deliver it.

Q. And this letter's dated March 15th, 2006?

A. That's correct.

Q. It indicates that "several months ago I requested" so and so.

A. That's correct.

Q. Now, does that refresh your memory as to when you first requested the documents that you're talking about; the deed in lieu of foreclosure and the truth in lending disclosures?

A. Yeah. My recollection was it was sometime Fall, or maybe even before that, the first time we requested in 2005.

Q. So Mr. Jubber's initial response was we'll get them to you?

A. Well, I think he said that he would check with his client to see if they have them. He checked with his client. I think next time I talked to him he said, "We have those. I'll send them to you."

Q. Okay. And when did -- you recall when you had that conversation?

A. Shortly before I received the disclosures.

Q. Okay. Will you look at Exhibit 7 and 8. They're in several documents behind each --

A. Yes.

Q. -- exhibit tab.

Are those the disclosures that you received?

A. Yes. I think they have the Bates-stamp at the bottom WF 01, et cetera, and I believe those were the disclosures that I received from Mr. Jubber's office.

Q. Did you have any other conversations with Mr. Jubber about these disclosures?

A. Oh, I'm sure we did. My letter, Exhibit 9, goes into detail about our position regarding those disclosures; that we didn't believe that they were -- last sentence in paragraph 2. "It's clear your client's attempt to mail disclosures to my client was inadequate." I think we had several discussions about whether they were valid disclosures or not. I think we filed the lawsuit in April, shortly after we received these disclosures, claiming violations of TILA, among others.

Q. And to your knowledge, did Mr. Jubber, on behalf of Winterfox, ever concede that the disclosures had not been given timely or that they were not required?

A. I don't believe he conceded that. I think he said, "They are what they are," as I recall. We looked at them. My recollection is we received those just shortly before that March 15th letter, so I think we received it after the first part of the year in 2006. Maybe -- maybe December before. But shortly before I wrote that letter.

Q. No further questions.

THE COURT: Cross Examination.

MR. JUBBER: Yes, your Honor.

THE COURT: Mr. Jubber.

CROSS EXAMINATION +

BY MR. JUBBER:

Q. Mr. Walker, referring to Exhibit 9, the second sentence states "In February 2006, approximately two months after my request, you provided me certain disclosures." Correct?

A. Yes. That's correct.

Q. So, in fact, I provided those disclosures upon your request, did I not?

A. Yeah. It was sometime after though. It had been months, as I stated in the first paragraph, months. And your first --

Q. Just -- I provided them, did I not?

A. Yes, you did. I think that's probably right. February 2006.

Q. You didn't send this letter to Winterfox, did you?

A. No.

Q. And you -- the lawsuit, this adversary proceeding, was filed very shortly after this letter, was it not?

A. Like I said, April -- I think the end of April '06.

Q. And isn't it true, Mr. Walker, that you told me in those conversations that Mr. Kitts had never received the disclosures? Isn't that true?

A. Yes. That's what I think I said in this letter as well.

Q. Thank you. Nothing further.

THE COURT: Both parties have referred to Exhibit 9 and read from portions of it. I don't think it's been offered or received, but I presume that since you both used it, there's no objection to the Court receiving it?

MR. AFFLECK: Thank you, Your Honor. We would offer it into evidence.

MR. JUBBER: No objection, Your Honor.

THE COURT: Exhibit 9+ is received. Mr. Affleck, do you have anything further of Mr. Walker?

MR. AFFLECK: No.

THE COURT: Sir, you may step down.

THE WITNESS: Thank you.

MR. AFFLECK: Your Honor, might we -- might we take a five-minute break at this time?

THE COURT: All right. We'll be in recess.

(Recess at 3:16 p.m. until 3:27 p.m.)

MR. AFFLECK: Trustee calls Kent Plott.

THE COURT: Sir, would you come forward and be sworn, please.

(The witness is sworn.)

THE CLERK: Please take the witness stand, and state your name and spell it for the record.

THE WITNESS: My name is Kent Plott, P-l-o-t-t.

DIRECT EXAMINATION +

BY MR. AFFLECK:

Q. Good afternoon, Mr. Plott, you didn't realize you were coming to court today, did you?

A. I didn't. I -- I knew that I'd be coming to court, but I thought it might be Thursday morning.

Q. And if you had gone, you would have worn a suit and a tie, wouldn't you?

A. Certainly.

MR. AFFLECK: I'd ask the Court to forgive Mr. Plott. But you look fine --

THE WITNESS: Thanks.

MR. AFFLECK: -- notwithstanding.

Q. Mr. Plott, you're an attorney?
A. I am.
Q. And you handle matters for Wells Fargo Bank. Is that correct?
A. Yes. Our office does.
Q. Foreclosure matters?
A. That's correct. And bankruptcy matters.
Q. And are you a custodian of records for Wells Fargo Bank with respect to files that you keep for them?
A. We are.
Q. There's a document in this case I'd like you to look at, Exhibit 59A.
May I approach the witness, Your Honor?
THE COURT: You may.
THE WITNESS: Yes.
Q. (BY MR. AFFLECK) You recognize this document?
A. I do.
Q. What is it?
A. It's a foreclosure or loan payoff quotation that was sent out from our office regarding a property at 2580 Bear Drive in Park City, Utah.
Q. Okay. And is this a true and correct copy of the document that you keep in your office and that you have primary responsibility over as the custodian thereof?
A. It is.

Q. And was this document prepared or made by personnel or an agent of Wells Fargo at or near the time of the occurrence, acts, conditions and events described in the document from information transmitted by a person with knowledge of those matters?

A. It was.

Q. And is this a document that is kept in the regular course of Wells' business and your business on behalf of Wells'?

A. It is.

Q. And was it made as a regular -- a regularly conducted activity and as part of a regular practice?

A. Yes.

MR. AFFLECK: Your Honor, I'd ask the Court to receive Exhibit 59A.

MS. BOULEY: No objection, Your Honor.

THE COURT: Exhibit 59A+ is received.

MR. AFFLECK: No further questions.

THE COURT: Are there any questions for this witness?

MS. BOULEY: No, Your Honor.

THE COURT: You may step down.

THE WITNESS: Thank you.

MR. AFFLECK: Thank you, Mr. Plott, for coming today. Kevin Bird.

THE COURT: Would you come forward and be sworn, please.

MR. AFFLECK: I'm sorry, Your Honor. May we call Kalex instead?

THE COURT: All right.

MR. AFFLECK: I've handed to the Court a unopened copy of the Kalex deposition that we received just this morning at about 10:30 a.m. And for this matter, Your Honor, Kalex is an out of state witness.

MR. MILLAR: Teleford. Brian Telford.

MR. AFFLECK: Mr. Brian Telford was designated as the witness for Kalex. His deposition was taken, was attended by Winterfox, and at this point, Your Honor, the Trustee has designated those portions of the deposition to be read, and at this point, Your Honor, we'd like to read that in. Mr. Millar will play the part of Mr. Millar, who took the deposition. I will play the part of Mr. Telford on the witness stand.

THE COURT: All right. The interior portion of the document from TSG Reporting of a deposition taken on April 29th, 2009.

MR. MILLAR: Your Honor, with the Court's permission, there are several references to the deposition exhibits which I presume are there attached, or they're attached with or along with the deposition transcript. Is that correct?

THE COURT: They are.

MR. MILLAR: The references within the transcript do not coincide with the trial exhibit references, and so for the convenience of the Court and for opposing counsel, I've prepared a document that shows the corresponding reference to a trial exhibit and would ask that I could note, in each instance where a deposition exhibit is referenced, the corresponding Bates page from the trial exhibit. Is that acceptable?

THE COURT: Yes.

MR. MILLAR: Would the Court like a copy of this document?

THE COURT: Yes, I would.

MR. MILLAR: May I approach the Bench?

THE COURT: You may.

Is there any objection, Ms. Bouley, to this illustrative aid?

MS. BOULEY: No, Your Honor.

THE COURT: Thank you.

"Q Good morning. Would you please state your name for the record.

"A My name is Brian Telford, T -- B-r-i-a-n, T-e-l-f-o-r-d."

MR. MILLAR: And for the assistance of the Court, each -- each time I will indicate the page number that we are reading from so that you can flip to the appropriate page. At this point we're reading from page 7. And given that maybe the parties didn't have an opportunity to get there, I will -- I'll start over for Mr. Telford. I'm reading from page 7, line 6.

"Q Good morning. Would you please state your name for the record.

"A My name is Brian Telford.

"Q Brian, could you please spell your last name, please.

"A T as in Tom, E as -- e-l as in Larry, F as in Frank, o-r-d, D as in David.

MR. MILLAR: Now turning to page 13, line 9.

"Q And subsequent to that, were you employed?

"A At my present employment, Kalex Software.

"Q When did you start your employment there?

"A 1998.

"Q And what was your initial job title in 1998 when you started?

"A Technical support representative.

"Q And what were your responsibilities as a technical support representative?

"A I'd troubleshoot hardware and software configuration, resolved customer -- general customer issues with the operation of the software.

"Q And what software are we referring to?

"A The Point Origination software.

"Q So Kalex Point software?

"A Correct."

MR. MILLAR: And over on page 15, line 1.

"Q So for how long -- what percentage of your time were you answering questions about Kalex Point software in 1998 when you started?

"A One hundred percent of the time.

"Q And for how long were you a technical support rep?

"A For two years.

"Q So approximately 2000 -- so until, approximately, 2000?

"A Correct.

"Q Then what did your title become in 2000?

"A Quality assurance analysist -- analyst.

"Q Can you say that again. Quality?

"A Quality assurance analyst.

"Q And you did that until when?

"A Did that until 2005.

"Q And what were your responsibilities as a quality assurance analyst from 2000 when you began -- when you began in 2000?

"A I tested the software to verify proper functioning. I reported defects in the defect tracking system. I worked with other departments, such as our support department, to reproduce and resolve issues.

"Q And when you say tested software, do you mean Kalex Point software?

"A Yes.

"Q Would you say that 100 percent of your time was devoted to Kalex Point software in 2000?

"A Yes.

"Q And did that at any point in time change between 2000 and 2005?

"A Yes.

"Q At what point -- at what point did your time -- at what point in time was your time not devoted exclusively to Kalex Point software?

"A 2002.

"Q And at what point -- what percentage of your time was devoted -- and at that point, what percentage of your time was devoted to Kalex Point software?

"A 70 percent.

"Q Were you aware, during your time as a quality assurance analyst, of any updates to any of the Kalex Point software forms?"

MS. BOULEY: Sorry, Your Honor. I'm not sure where we are now.

MR. MILLAR: I'm sorry.

MS. BOULEY: Oh. Thank you.

MR. MILLAR: Line 14.

"Q Were you aware, during your time as a quality assurance analyst, of any updates to any of the Kalex Point software forms?

"A Yes.

"Q What was your role in, or your responsibility, in those updates?

"A I verified the verbiage on the form, verified the form actually points out correctly with the intended formats and no misspellings. Basically that's it. Verification of validation.

"Q Would you say that -- did you assist in the actual update itself?

"A Yes. There were times that I did.

"Q What did you do, and are you testifying today that you assisted in the creation of the updated form?

"A There were times where I assisted in the creation of an updated form because I was asked to. It wasn't my main job, but there were occasions where I was responsible for helping in the creation or update of a form.

"Q And what would that -- what form would that assistance take?

"A It would involve taking the existing form and comparing it with the form provided by the regulators or the companies that create the actual model forms, and then updating our form to match so that the form would be in compliance."

MR. MILLAR: Now on page 21, line 2.

"Q Okay. I want to -- well, let me ask you this: From after -- approximately what time in 2005 did you obtain a different job title?

"A Approximately March or April. I don't remember exactly, but that's to the best of my recollection.

"Q And what was your job title at that point in time?

"A Functional requirements writer.

"Q And until what time, until what date -- so you were a functional requirements writer from approximately March or April of 2005 until what date?

"A Until July 2006.

"Q What did you do as a functional requirements writer?

"A I wrote software requirements. That was my main responsibility.

"Q For what software?

"A For Kalex Point.

"Q Can you tell us a little more about what exactly you did in terms of writing software requirements and what that means?

"A Writing software requirements means to take a particular feature request from our users and document or translate that request into a document that specifies every behavior of a form or a strain or a feature, and then hand that over to a software programmer, and they can actually write the code based upon that document.

"Q And did that responsibility that you've described, writing software requirements, did that comprise a hundred percent of your time from March or April of 2005 to July of 2006?

A. Yes."

MR. MILLAR: Turning now to page 28, line 7.

"Q Would you say that you are familiar with updates that have -- that Kalex has made to its

Point software forms from 1998 -- excuse me -- from '98 to present?

A. Yes."

MR. MILLAR: And on page 29, line 20.

"Q Could you distinguish between a Kalex Point software form and a form from another entity that attempts to duplicate Kalex Point software?

"A Yes. It would be -- to me it would be a clear distinction."

MR. MILLAR: Turning to page 35, line 15.

"Q When the "date prepared" field auto populates, what date does it enter?

"A It enters -- so if I were to tab in the field today, it would populate the current date that's on my computer system. So if my computer system is April 29, 2009, then it would populate 4-29-09 in that field.

"Q When you say, "4-29-09," would it populate 04/29/09?

"A It would actually populate 04/29/2009 would be the full string of information."

MR. MILLAR: Turning now to page 63, line 20. Page 63, line 20.

"Q Now let's talk, just for a minute, about a Kalex Point software footer. Does that footer always include the release date?

"A It includes the -- it includes the release date in the most recent time in which the form was updated. So if the form -- if the date in the footer says 6-06-05 and we're in 2009, if there were no updates needed between 06-05 and today, then it would still say 06-05. But in -- but if in '07 we fixed an issue or we made a change for compliance, then it would -- it could say 03-07 if the release date was in March '07.

"Q Okay. Can a user edit a Kalex Point software footer?

"A No. That's not possible."

MR. MILLAR: Down at line 24.

"Q And if there's a footer, is it correct that there will be a date in the footer?

"A Yes.

"Q And is that -- what is the format of that date?

"A It is always the two-digit month/two-digit year.

"Q And has that always been the case for each version of the Kalex Point software forms?

"A Yes. As far as I know, it has.

"Q Is it possible for a user to be looking at a Kalex Point software form on a given day, and that date in the Kalex footer precedes -- or excuse me. Let me rephrase that question. If I am inputting data into a Kalex Point software form on April of 2000, is it possible that that same form would have a Kalex footer -- have in the Kalex footer a date that is July of 2000?

"A No. That's not possible.

"Q Would it be possible, if I'm working on a Kalex form in April of 2000, for the form to have a release date of May 2000?

"A It is possible if they were using a Beta version of their software where they were testing the software as a Beta user in April, and because they're seeing the software in advance of everyone else, then it's possible in that case.

"Q And how soon, prior to the software release of a given version of the software, does Kalex release its Beta version?

"A Typically it's released six weeks before the -- six to eight weeks before the release date."

MR. MILLAR: Turning to page 82, line 20. And here there will be a string of references to Exhibit 7 and Exhibit 8.

"Q Let's turn to Exhibit 1-11 which is exhibit -- Trial Exhibit 8 at Winterfox 18. You can keep your finger in Exhibit 1-2 which is Trial Exhibit 7 at Winterfox 9 for ease in referring to that. What is this document?

"A Exhibit 1-11 which is Exhibit 8 at Winterfox 18?

"Q Yes.

"A Do these two documents, Exhibits 1-11 and 1-"

MR. MILLAR: Excuse me.

MR. AFFLECK: Oh. I'm sorry.

MR. MILLAR: The question -- the question is "Yes."

"A It is a truth in lending disclosure, and it discloses the cost of a loan expressed in terms of an annual percentage rate.

"Q And this is a Kalex Point software form?

"A It is.

"Q How can you tell?

"A Again, it has the characteristics of a form produced out of Point with the outlined boxes for the first two annual percentage rate and finance charge, the spacing of the check boxes starting from the insurance section, and it's very Kalex characteristic.

"Q Would you be able to distinguish this form from a truth in lending disclosure statement from another entity?

"A I would, yes.

"Q And does it appear that this is the default font size used under 'applicant,' 'property address?'

"A It is, yes.

"Q And do you see where it says 'Application No., Kitts 3?'

"A I do.

"Q Does this mean that this comes from the same file as the Good Faith Estimate listed at 1-12 which is Exhibit 8 of Winterfox 19?

"A Yes.

"Q Do these two documents, Exhibit 1-11 which is Exhibit 8 at Winterfox 18 and 1-12 which is Exhibit 8 at Winterfox 19, have been printed at different times?

"A Yes.

"Q And do you see where it says 'Day Prepared?'

"A I do.

"Q What do you see in that field?

"A On Exhibit 1-11 which is Exhibit 8 at

Winterfox 18?

"Q Yes.

"A I see a partial number that's been whited out or something has happened to the number, but it's illegible. But it looks like it had printed, but I can't tell what happened to it.

"Q What number does that look like?

"A It looks like part of a zero.

"Q Would that be a zero in the same font that is used under Property Address and Application No.?

"A It would be the same font, because the form prints in the same font when it's printed in a print job."

MR. MILLAR: Turning now to page 98, line 4.

"Q All right. Let's turn now to Exhibit 1-5 which is Trial Exhibit 7 at Winterfox 12.

"A Okay.

"Q What is the document that's represented at Exhibit 1-5 which is Exhibit 12 at Winterfox -- excuse me -- which is Trial Exhibit 7 at Winterfox 12?

"A It's a privacy policy disclosure informing the borrower of their right to opt out of information being shared.

"Q And this document -- and is this document a Kalex Point software form?

"A It is.

"Q How can you tell?

"A With this particular form I can tell because there is no one privacy disclosure. We created a generic privacy policy disclosure, and this is definitely identifiable as ours. I recognize the wording, and, in addition, then it does have the Kalex footer at the bottom right.

"Q Can you read that Kalex footer into the record.

"A Kalex Form-Privacy 1. FRM 06/05.

"Q And what does the date 06-05 indicate on this form?

"A It indicates that the privacy -- this form was last updated in June 2005. That coincided with the release of June 2005.

"Q So this form is released to the public in June of 2005?

"A That's correct.

"Q Was there a Beta for this; that June 2005 software release?

"A There was.

"Q When did that Beta -- when was that Beta

released to users?
"A It would have been released in April of 2005. Late April, early May.
"Q How do you know that?
"A Based on my recollection of the schedules that we had at that time.
"Q Were you involved in that Beta release?
"A I was.
"Q What was your involvement in that, in the Beta release?
"A At that point I was sort of in two worlds. I was the quality -- I was quality assurance in one respect, and then I was also functional requirements writer in another respect. At that time I was in the middle of transitioning from one position to the other, so I played both roles.
"Q Is it possib -- excuse me. Is it possible that a user would be using this form in February of 2005?
"A No. Actually, let me amend that a little bit. This privacy policy disclosure was updated in June 2005 with that release. It was not initially released in that version. So, yes, it's possible that in February 2005 somebody could

have been using that, because the form was actually introduced earlier. I don't recall exactly when it was introduced, but it was introduced earlier 2000 -- during 2005 we made a -- we probably made some verbiage updates to the form based on customer requests.

"Q But if a user was using a privacy policy disclosure form from Kalex Point software in February of 2005, or prior, would it have the Kalex footer that this Exhibit 1-5 has, which is Exhibit 7 at Winterfox 12?

"A No. In February 2005 -- oh. Not in February 2005, because that would have been the earlier form. Whenever it was released in that version, I don't know when the -- what the previous date on the bottom footer was at that time, but it would not -- it could not have been June of 2005.

"Q The date in the Kalex footer could not have been June 2005 if a user was inputting information into this document in February of 2005?

"A That's correct.

"Q Or at any time prior to February 2005?

"A That's correct.

"Q And is Exhibit 1-6, which is Trial Exhibit 7 at Winterfox 13, part of -- part of the privacy policy disclosure at Exhibit 1-5 which is Trial Exhibit 7 at Winterfox 12?

"A Yes. This is the second page of the disclosures."

MR. MILLAR: Turning now to page 102, line 22.

"Q Turn to Exhibit 1-13 which is Exhibit 8 at Winterfox 20. If you could just keep your hand there at 1-5 which is Exhibit 7 at Winterfox 12. Do you recognize the exhibit at 1-13 which is Exhibit 8 at Winterfox 20?

"A I do.

"Q What is this?

"A It is the same page 1 as Exhibit 1.5 which is Exhibit 7 at Winterfox 12.

"Q It's also a Kalex Point software form?

"A It is.

"Q Is there an application number?

"A No. In this form there is not.

"Q If you look at Exhibit 1-14, which is Exhibit 8 at Winterfox 21, do you see the loan number? It says "Kitts 3." Is that correct?

"A Yes.

"Q Is that the same thing as the

application number?

"A Yes.

"Q Is it true that this file then -- is it true that the document represented at Exhibit 1-13 which is Exhibit 8 at Winterfox 20, and 1-14 Exhibit 8 at Winterfox 21, necessarily are part of the same file as other forms listed in Kitts 3?

"A Yes.

"Q And if we could backtrack to Exhibit 1-5 which is Exhibit 7 at Winterfox 12, and 1-6 which is Exhibit 7 at Winterfox 13, do you see there on Exhibit 7 at 13 -- at Winterfox 13 where it says 'Loan No. Kitts?'

"A Yes.

"Q What does that mean?

"A That means the file name in the Point software was Kitts.

"Q Is this document necessarily part of or in the same file as each of the other documents listed as 'Kitts' in the application number?

"A Yes.

"Q Looking at Exhibit 1-13 and 1-14, which are trial Exhibit 8 at Winterfox 20 and 21, does this appear to be the same version or does this appear to come from the same software version as that listed at 1-5 and 1-6 which is Exhibit 7 at Winterfox 12 and 13?

"A Yes, it does."

MR. MILLAR: Going over to page 105, line 1.

"Q At the bottom of Exhibit 1-13, which is Exhibit 8 at Winterfox 20, you see the Kalex footer?

"A I do.

"Q And the footer says "0605." Is that correct?

"A That's correct.

"Q When was this document released to the public?

"A It was released in the 5.3 release in June of 2005 point version 5.3.

"Q When was the Beta released for that, for this form?

"A Late April, early May of 2005.

"Q Could you explain how a user could be accessing this form prior to the release of the Beta in late April or early 2005?

"A Well, they can't access the form in the version that this update was released in, but the form existed in previous versions.

"Q Okay. So you could have a user -- so a user could have -- could have -- excuse me -- so could a user have accessed the version of the form that you see represented at Exhibit 1-13, which is Exhibit 8 at Winterfox 20, and 1-14, which is Exhibit 8 at Winterfox 21, at any time prior to March of 2005?

"A No. I don't see how that's possible."

MR. MILLAR: No further questions, Your Honor.

THE COURT: Counsel, do you have questions for the witness or additions from the deposition?

Mr. Affleck, wait a minute.

MS. BOULEY: I'm sorry, Your Honor. Your Honor, we didn't -- we were not informed of which portions of this deposition they were going to read into the record prior to this just happening, so I would like to request that I have an opportunity to review the rest of the deposition to see if there's anything we would like to read from.

THE COURT: Right now? Or --

MS. BOULEY: No. I could do it --

THE COURT: -- at some point in the future?

MS. BOULEY: I mean, I could do it this evening and read it in on Thursday or, you know, whatever the Court would prefer.

THE COURT: All right. Do you have any objection to that, Mr. Affleck?

MR. AFFLECK: No, I don't, Your Honor.

THE COURT: All right. We'll save any additions that the Defendant may wish to read into the record to make the record complete until a subsequent hearing. So you may step down now.

MS. BOULEY: Thank you, Your Honor.

MR. AFFLECK: Your Honor, at this point I'd like to revisit the issue of Exhibit 60. It is Trustee's contention, Your Honor, that that exhibit has been stipulated to by Winterfox, and I think they've probably had a chance to confirm that, and I'd like to offer that at this point.

Perhaps while we're waiting, Your Honor, again for this, we can look at Exhibit 68 which is Daily Treasury Yield Curve rates beginning in January of 2004. We would ask the Court to receive judicial notice of the information contained in that document that was taken from the Internet and -- an Internet site and indicates the treasury yields.

MS. BOULEY: Your Honor, we'd object on the basis of authenticity and foundation for the document on the treasury yields. As far as Exhibit 60, I indicated to Mr. Millar that I would look at that tonight. It's not part of our formal stipulation here as there may be something on my e-mail since yesterday. But, again, I'm limited to trial preparation and have not been able today to stop and look at what was sent to me on the e-mail, so I'll have to look at the Exhibit 60 tonight.

MR. AFFLECK: Your Honor, and I would just submit that this document is a document from the U.S. Treasury.

THE COURT: All right. We're not on 60.

MR. AFFLECK: 68.

THE COURT: No. We're on 60.

MR. AFFLECK: Oh. We're on --

THE COURT: All right. So --

MR. AFFLECK: Oh. Sorry.

THE COURT: -- we're going to defer Exhibit 60 until counsel's had an opportunity to review whether there was a commitment to stipulate to its admissibility.

MR. AFFLECK: All right, Your Honor.

THE COURT: All right. If you got an e-mail, send it again. All right.

MS. BOULEY: I'm sorry, Your Honor. Mr. Millar has just pointed out to me that I guess it is part of our --

THE COURT: I'm -- I'm sorry. You're going to have to speak into the mike.

MS. BOULEY: Okay. Certainly. Mr. Millar has pointed out that it looks like the Wamu has and is part of our stipulation, so I apologize. He must have been talking to me about something else. So Exhibit 60 is part of the stipulation.

THE COURT: All right. And Exhibit T60 is a document on the letterhead of Skalley & Reading. We all have the same document?

MS. BOULEY: Yes. I believe so.

MR. AFFLECK: Yes, Your Honor.

MS. BOULEY: I'm sorry. Did you ask me a question?

THE COURT: I just want to make sure that everybody is be on the same document, and that everyone is agreeing that this is coming in by stipulation. It's a document on the letterhead of Skalley & Reading.

MS. BOULEY: Yes, Your Honor.

THE COURT: All right. Exhibit T60+ is received.

MR. AFFLECK: We ask the Court to receive Exhibit 68, T68.

THE COURT: All right. And the objection is lack of foundation? Is that it?

MS. BOULEY: Yes, Your Honor. Authenticity and foundation. I don't know that this printout, again, is authentic. We don't know that foundation has been established for it. I don't know that this is an official or accurate list of the daily treasury yield curve rates.

MR. AFFLECK: We would ask the Court to take judicial notice of this document as a copy of a document maintained -- an electronic document maintained by the United States Government containing the daily treasury --

treasury yield curve rates.

THE COURT: Judicial notice of a web page.

MR. AFFLECK: Or you can take judicial notice of a fact that is easily proveable, that is out there. And I believe it is appropriate in this case where these are -- this is a information maintained by the government, it's easily verifiable, that the Court may take judicial notice of it.

THE COURT: All right. Ms. Bouley, I don't really see a way that this is impeachable at this point.

If foundation is an issue, Mr. Affleck, can you make a proffer regarding who it was that --

MR. AFFLECK: Yes. I'll make a proffer that Mr. Aaron Millar printed this off of the website shown at the bottom of the page on 8-14-2009. And Mr. Millar is, of course -- oh, wait a minute. I'm sorry, Your Honor. It was Nancy Pershon who printed it out, who is also in the courtroom today and could testify.

THE COURT: Is there any objection to the proffer desire to cross examine?

MS. BOULEY: No, Your Honor.

THE COURT: All right. The proffer is accepted. T68 is received.+

MR. AFFLECK: I would ask the Court at this point to receive Exhibits 4, 5 and 6 which are proofs of claim filed by Winterfox in this bankruptcy case.

MS. BOULEY: And, Your Honor, we object on the grounds of, first of all, hearsay and, secondly, relevancy. I don't see how Winterfox's proofs of claim in the bankruptcy are relevant to this adversary proceeding where the claim is for damages. Those two are completely separate.

THE COURT: All right. What fact are you trying to prove?

MR. AFFLECK: We're just trying to prove the fact of -- of what Winterfox is claiming in this case in the -- for its Proof of Claim.

THE COURT: For --

MR. AFFLECK: The principal amount.

THE COURT: For what purpose?

MR. AFFLECK: For foundational purposes for closing argument to describe what it is that they are seeking from this bankruptcy estate in the nature of finance charges, interest, so forth. And we would submit that the documents are an admission of Winterfox as to what it claims.

MS. BOULEY: Your Honor, the Court's already excluded interest on this matter and, again, this is a stand-alone claim for damages against Winterfox. It has nothing to do with Winterfox. It does not affect the validity of the note or the trust deed that is the subject of the Proof of Claim in the bankruptcy.

THE COURT: I'm having a hard time seeing why the

Proofs of Claim of the creditors seeking funds from the Estate, what that has to do with the Estate's claim in this adversary proceeding.

MR. AFFLECK: The Estate's claim in this adversary proceeding under 1640, as this Court has recognized, there are four categories of damages. Actual damages, statutory damages, attorneys' fees, and finance charges. The Court has determined that finance charges will be based on whatever evidence we have of what was paid in finance charges, and there will be no damages of finance charges that have not been paid but have been claimed. However, the Trustee asserts that under TILA, to the extent the Court determines that there was a TILA violation in this case, the Estate should not have to pay the interest, finance charges and so forth that Winterfox is still claiming against this Estate.

THE COURT: Well, are you claiming that through these documents there is a calculation that's relevant to the claims here?

MR. AFFLECK: The calculation of the interest, obviously we're not seeking payment of interest in affirmative relief as damages that has not been paid. What we are seeking is to avoid the obligation to pay them. So it's only for the purpose of establishing what it is that Winterfox is seeking.

THE COURT: Counsel, do you have anything?

MS. BOULEY: Your Honor -- oh. I'm sorry.

THE COURT: Do you have anything further?

MS. BOULEY: Yes, Your Honor. As I understood your ruling this morning, you've already ruled that the Trustee is not entitled to interest as part of -- as part of his damages in this adversary proceeding. And, again, it's a stand-alone damages claim under TILA. It's not tied to the Proof of Claim.

THE COURT: All right. I'm going to receive the documents, but only for the limited purpose as set forth on the record.

MR. AFFLECK: Thank you, Your Honor.

THE COURT: There -- there's nothing in this Proof of Claim or in this case that deals with offset or -- in fact, that was specifically excluded. So Exhibits 4, 5 and 6+ are received with that limitation.

MR. AFFLECK: Thank you, Your Honor. The Trustee would call Brian Kitts.

THE COURT: Sir, would you come forward and be sworn, please.

(The witness is sworn.)

THE CLERK: Please take the witness stand, and state and state your name and spell it for the record.

THE WITNESS: My name is Brian Kitts. B-r-i-a-n, K-i-t-t-s.

DIRECT EXAMINATION +

BY MR. AFFLECK:

Q. Where do you currently reside, Mr. Kitts?

A. 2580 Bear Hollow Drive in Park City.

Q. When did you purchase that home?

A. November 1998.

Q. Did you pay cash for it or finance it?

A. It was a down payment, and the balance was owner financed.

Q. Did you take legal title in your name or in the name of another?

A. In my name.

Q. Were you married at the time you bought the residence?

A. No.

Q. When were you -- when did you become married?

A. May 26, 2000.

Q. And who did you marry?

A. My wife, Laurie.

Q. Are there any children between you?

A. Between us, no.

Q. Are there any children that came into this marriage from previous marriages?

A. Yes. I have two, and they're both adults, and

Laurie had three at the time. 15, 5, and 3 years old. 15, 6 and 3 years old.

Q. So since your marriage to Laurie and bringing together this family, have you resided anywhere else than the home at Bear Hollow Drive since that time?

A. Since we bought the home, no.

Q. When you purchased the home, you said you took legal title in your name. Did you subsequently change who held legal title?

A. Yes.

Q. And in whose names has legal title to the property been held in?

A. It's been in my name, it's been in our holding company's name, Sun Peak Holdings, and I do believe it's been in my wife's name, solely my wife's name, at some point.

Q. What is Sun Peak Holdings?

A. It is a company that is owned by my wife and I wholly. We just have it as a holding company just for ourselves.

Q. And what are the -- do you -- is it an LLC or a corporation?

A. It was a corporation.

Q. And you say you and your wife are owners. In what percentages?

A. 50-50.

Q. In connection with the changes of title, you mentioned that it's been changed to your name, Laurie's name, Brian and Laurie together, and Sun Peak Holdings?

A. Correct.

Q. In any of those circumstances where legal title changed, was there any money that changed hands in connection with those changes?

A. No. Are you referring to between Sun Peak and ourselves?

Q. Yeah.

A. No.

Q. Why was legal title to the property put in Laurie's name or your joint names from time to time?

A. For -- whenever we refinanced the home, the -- the lender would require that we had legal title to the -- to the home. And so at the time of closing, we would quit deed it out of Sun Peak into either my name or my wife's or both of ours, sign the documents, and then quit deed it back.

Q. Okay. Did someone advise you to do that?

A. Yes. At the time I was involved in a publicly-traded company as an officer and director, and it was an attorney that suggested that we just take our home and put it in a holding company, even though we owned a hundred percent of the company, as he described it, just as a shield. And, you know, I mean, that could be easily broken because we were the only two shareholders in the company.

Q. Has your home ever been used as a rental property?

A. Well, during the Olympics we were given an opportunity to rent our home out to Shell Canada, and that was done through Caldwell Banker. And our broker, ++Marney Schlope, and her husband, Kent, approached us and said that they could possibly have somebody that would rent the home during the Olympics, and so we signed up. And 9/11 came around, and a lot of corporations canceled their visits to Park City because of what happened that day. And we got paid for the 29 -- 21 nights they were supposed to stay there, but nobody ever stayed in the house. It was empty.

Q. And was this contract between you and the entity or between Sun Peak and the entity?

A. I do believe it was between myself and Caldwell Banker.

Q. Let's fast forward to December 2004. What was happening with the house?

A. If we could just back up a bit to the summer or the spring of 2004 --

MS. BOULEY: Objection, Your Honor. The witness -- we request the witness be asked to answer the question.

THE COURT: Sir, if you just answer the question that

Mr. Affleck asks, please.

THE WITNESS: Okay. How can I put this? Leading up to December of 2004, I had a broker who I had worked with for several years.

Q. (BY MR. AFFLECK) You can -- Mr. Kitts, you can just answer my question. What was happening with the house in 2004?

A. Oh. Okay. Just be specific. There was two foreclosure notices and a -- and a lien, a judgment. The two foreclosure notices were from Washington Mutual and from Wells Fargo Bank, and the -- the judgment was from Ed Ingram Construction.

Q. Okay. And how close were those creditors to actually foreclosing and getting to a foreclosure sale? Do you recall?

A. I don't recall exactly how close, but I do know that at least one of them, I think, would have been in the month of December.

Q. Would you turn to Exhibit 50. This is a Notice of Default and Election To Sell from Wells Fargo Bank. It has been received into evidence. Does this refresh your recollection as to the timing of the impending foreclosure for Wells Fargo?

A. Yes.

Q. And what is your recollection?

A. This looks like it was filed on -- on September 6th. Correct?

Q. I read September 16th, sir.

A. Okay. Down here. Okay. Sorry. On the first paragraph it says September 6. So September 16th.

Q. Does this refresh your recollection about the timing of the foreclosure sale on the Wells Fargo lien?

A. Yes.

Q. And how is your recollection refreshed on that issue?

A. I -- I -- I -- I knew that a sale was very close to happening.

Q. Okay.

A. I can't tell you exactly how many days, but I knew it was urgent to -- to close a mortgage, get refinancing.

Q. And Exhibit 51, if you'd take a look at that, that's also been received into evidence. Were you aware that Washington Mutual had also filed a Notice of Default on November 4th, 2004?

A. Yes.

Q. Or, I should say, recorded a Notice of Default.

Was it important to you to stop these foreclosures?

A. Yes.

Q. What was your strategy to address these liens and address these foreclosures?

A. I had been working with a mortgage broker by the name of Michael Falk for several years, and we had received, what would you call it, an approval on a mortgage back in June of '04 that would have refinanced all of the existing liens against the property in one jumbo loan. And the condition was that I had to come out of a Chapter 13, which I did during the month of June. And the next day there was two individuals LaVon Koshkarian and Max VonApp that filed a lis pendens against the property. So I had to take care of that.

Russ Walker my attorney, worked with me on that, and we had that satisfied by the -- I'd say by mid September. And Michael Falk went back to the bank at that point, it was an out-of-state bank, and they were no longer doing jumbo loans, so he had to start from ground up and find a, you know, find a new mortgage for me.

Q. Okay. So you had attempted to obtain conventional loans, you were thwarted in that effort; and what time period was this we're talking about? Is this --

A. We're talking April '04 through to the mid -- mid September of '04. At that point, when he knew that the -- the mortgage commitment we had had gone away because of the bank's position on jumbo loans, he immediately started looking for another loan and continually assured me that --

that he would be able to close it because nothing had changed, you know, at all in the circumstances, and he didn't feel it was going to be a problem at all to get conventional financing for me.

Q. Was Mr. Falk able to find conventional financing for you in -- are you talking about in September, October, November?

A. In -- in hindsight, what I realize now, he had a tremendous amount of problems going on in his personal life.

MS. BOULEY: Objection. Nonresponsive.

THE COURT: Sustained.

MS. BOULEY: Move to strike.

THE COURT: Sustained.

Q. (BY MR. AFFLECK) Was he able to do that? Was he able to get a conventional --

A. Unfortunately not.

Q. Do you understand why he was unable to do so?

A. I don't think he was focused on the task.

Q. And why do you think that?

A. Because of problems he was having at home in his personal life.

Q. And did there come a point where you asked Mr. Falk to find non-conventional financing for you?

A. No. He came to me with the proposal.

Q. Okay. When you initially -- when did you initially retain Mr. Falk to help you refinance this property?

A. Are you asking when I first started working with him?

Q. Yeah. To address these --

A. Oh. These issues?

Q. These loans. Wells Fargo, Washington Mutual.

A. It would have been spring of '04 is when I -- we first started looking at it.

Q. Okay. Did you supply him with information to assist him in finding a loan for you?

A. Because it was a conventional mortgage, yes, I would have.

Q. And did you -- what did you supply him with, if you can remember?

A. It would have been a list of assets versus liabilities. That is basically all it is.

Q. Okay. And do you have a copy of that, of what you gave him?

A. No.

Q. Did you -- you were in court today when Mr. Olivarez testified about a loan package, weren't you?

A. Right.

Q. He testified about a credit report, a Uniform Loan Application, appraisals and other items that were in a loan package. Did you supply the information for that loan package?

A. The -- the uniform -- what are the first one you --

Q. It was an application, Uniform Application for a loan.

A. Yeah. The Uniform Application I would have filled out by hand and given it to him, and he probably would have typed it up based on my information. The appraisal -- he ordered the appraisal, and I paid for the appraisal. I do still have a copy of that I think. What were the other items?

Q. I think he testified about a credit report, taxes, appraisals.

A. He would have -- he would have obtained the credit report himself with my authorization; and as far as tax returns, I'm not sure if I supplied those to him.

Q. Did you supply him with any information regarding Sun Peak's assets and liabilities?

A. No.

Q. Did you authorize Mr. Falk to share the information in the loan package with third parties?

A. Yes.

Q. To your recollection, did the loan application indicate your purpose for seeking a loan?

A. It would have indicated that it was a refinance.

Q. Anything else on the -- that you recall on the purpose of the loan?

A. No.

Q. Do you recall whether the application indicated that the property was your residence?

A. I don't know whether it would have indicated that.

Q. How did you become acquainted with Winterfox?

A. Michael approached me at the end of November telling me that he needed more time to close on a conventional mortgage, and he said that he needed to bring in a hard-money lender for a very brief period of time, and he had somebody in mind. He set up a meeting, and Thomas Adams, Thomas Adams' son, Aaron Olivarez and Michael Falk came to my home. My wife was there. Then we did a quick tour around the house, and then sat in the living room and just discussed what I needed.

Michael insisted that he only needed the money for a very short period of time, and my response was just absolutely no way. We need this for at least six months or I'm not interested, because Michael's pattern up to that point --

MS. BOULEY: Objection, Your Honor. This is going beyond the scope of the question.

THE COURT: It is. Sustained.

MS. BOULEY: Move to strike.

THE COURT: I don't know how far back to go. That's denied.

Q. (BY MR. AFFLECK) So you became acquainted with Winterfox through Michael Falk?

A. Yes.

Q. And Winterfox eventually made two loans to you. Isn't that right?

A. Yes.

Q. One on December 8th for 1,350,000, another one a few weeks later, December 31st, for $39,603.47. Is that correct?

A. Yes.

Q. Now, we've looked at some notes in this case which are Exhibits 1 and Exhibits 2, if you'd take a look at those. You see those documents?

A. Yes.

Q. In Exhibit 1, the second page is the trust deed note. In paragraph 3 it describes a deed in lieu of foreclosure. Do you recall signing that deed in lieu of foreclosure in connection with this first note?

A. No, I don't.

Q. The second trust deed note or second -- Exhibit 2 and the second trust deed note is two pages after the first page, that also indicates a deed in lieu of foreclosure. Do you recall signing a deed in lieu of foreclosure for this note?

A. Actually, I don't recall signing it. And I'm trying to remember if somebody -- if somebody showed me the deed at my deposition, but I'm not sure. The deed in lieu of foreclosure. But prior to that, if I had signed it, I -- I, you know, I never had a copy of it.

Q. Okay. Now, these loans indicate that the deed in lieu of foreclosure, and I think we've established that the default date was February 21st, 2005. You didn't pay these loans by that date, did you?

A. No.

Q. And Exhibit 3. That's an addendum that was signed by you that extended the period of the first two notes. Correct?

A. Yes.

Q. And in this document, this document also references in paragraph 4 another deed in lieu of foreclosure. And I would like you to look at Exhibit 64. You see that document?

A. Yes.

Q. You recall -- you recall signing this document?

A. Hold on for a second. It looks like my signature.

Q. Okay. And this document is dated February 24th, 2005. Is that your recollection of when it was signed?

A. That's what it -- that's what it says.

Q. Now, this addendum extended the due date of the loans to March 21st. You didn't pay those loans by March 21st either, did you?

A. No, I did not.

Q. Did anyone at Winterfox contact you after March 21st about your failure to pay?

A. At the end of March, possibly the very, very beginning of April on a --

Q. And who contacted you?

A. It was Aaron Olivarez came to my door. He did not have my phone number, and he could not get a hold of Michael.

Q. Okay. And did you have a conversation with Mr. Olivarez at that time?

A. Yes.

Q. And what was the conversation?

A. He expressed --

MS. BOULEY: Objection. Hearsay.

MR. AFFLECK: Your Honor, we have had a lot of evidence come in about Mr. Olivarez's understanding of facts at issue in this case based on what Mr. Kitts has told him. I think it comes in for the same reasons that Mr. Olivarez's testimony has come in. To establish what Mr. Olivarez's understanding may have been regarding the facts.

THE COURT: It's still hearsay. Do you have some exception? Tell me what the exception is.

MR. AFFLECK: Yes. It's coming in to establish Mr. Olivarez's understanding and to impeach him as well.

THE COURT: Well, that's not an exception. The objection's sustained.

Q. (BY MR. AFFLECK) So you had a conversation with Mr. Olivarez?

A. Yes.

Q. Do you remember what the topic of the conversation was?

MS. BOULEY: Objection. Hearsay.

MR. AFFLECK: I do have one more response to that, Your Honor.

THE COURT: All right.

MR. AFFLECK: I think Mr. Olivarez was working in the scope of his employment through -- or consulting arrangement, whatever you want to call it, for Winterfox, and, therefore, it comes in -- whatever Mr. Olivarez comes in comes as -- comes in as an admission of -- of an agent for Winterfox.

MS. BOULEY: And, Your Honor, that foundation has not been laid. It was not addressed with Mr. Olivarez and it's not been established that he was acting within the scope of his employment at this point in time.

MR. AFFLECK: Mr. --

MS. BOULEY: -- wasn't there at the time.

THE COURT: After the loan?

MS. BOULEY: Right. That he was at Mr. Kitts' place of his, you know, on the -- at the behest of Winterfox.

THE COURT: I'm going to overrule the objection.

MR. AFFLECK: Okay.

THE COURT: You may answer.

Q. (BY MR. AFFLECK) Tell me -- tell me about your conversation with Mr. Olivarez.

A. He was concerned that he couldn't get a hold of Michael. He was concerned about the status of conventional financing that Michael was supposed to be working on. I expressed that I was equally concerned. We started talking about his drag racing career. When I was a teenager, I used to drag race motorcycles. And we got off track onto that, came back to -- I asked him if he would be able to find me conventional financing.

He said he had an agreement with Winterfox and could not do that, and he couldn't bring a loan anywhere else, and he gave me the name of Lynn Spafford, a mortgage broker that he knew. And I don't remember whether he gave me the phone number at that time, called me back with it, or had Lynn call me, but a short time after that, I started working with Lynn to obtain conventional financing.

MS. BOULEY: Your Honor, we move to strike that answer as hearsay. Sorry. It's the same as hearsay. That goes beyond the scope of the question which was just the substance, the general substance of the conversation.

THE COURT: It does go beyond the scope, so --

MR. AFFLECK: Is Your Honor striking the entire answer?

THE COURT: It's late --

MR. AFFLECK: I could ask --

THE COURT: -- coming in, so I don't -- I don't know where to strike.

MR. AFFLECK: I could ask the question again.

THE COURT: All right.

MR. AFFLECK: If you'd like.

Q. This time in your answer, let's not talk about the motorcycles or Mr. Spafford. What was Mr. Olivarez --

MS. BOULEY: Objection, Your Honor. Counsel's instructing the witness how to answer.

THE COURT: The objection's overruled. He's just trying to get the witness to be responsive.

Q. (BY MR. AFFLECK) Well, just tell me what Aaron Olivarez had to say about the Winterfox loan that was in default at that point.

A. He was concerned about the status of refinancing, he was concerned about the fact that he couldn't reach Michael, and was wondering what we were going to do to solve the problem.

Q. Okay. And what did you tell him you were going to do?

A. Seek other financing.

Q. All right. And did you seek other financing through Michael Falk?

A. Yes. No. Not through Michael Falk.

Q. Through others?

A. Through others.

Q. And would that other person be Lynn Spafford?

A. Yes.

Q. Okay. And was Mr. Spafford able to find a new loan for you?

A. Yes.

Q. Did you close on that new loan?

A. We had approvals in April. I don't remember the exact date of the bankruptcy filing. Was it May 4th?

Q. I believe it was early May.

A. Yeah. May 4th. So by the end of April, we had approvals subject to a few conditions that were easy to remedy. That was getting towards the end of April. I -- I received a phone call from Aaron's partner, and I don't remember her name. I never remember her name.

Q. Marco Fields?

A. Marco Fields. And she was quite irate on the phone.

Q. Okay. Hold on a second, Mr. Kitts. Let's focus on this phone call. When did this phone call with Marco Fields occur?

A. It would have been in April.

Q. Who called whom?

A. She called me.

Q. Did she represent that she was calling on behalf of Winterfox?

A. Yes.

Q. So what did she want? What did she tell you?

A. She basically was just threatening that they were going to close -- they were going to file their deed in lieu of foreclosure that they had if I did not come up with new financing. And I explained that we had two or three loans that were approved subject to certain conditions, but I would not be able to get it done within the time frame that she was specifying which was right now. And I went and saw my attorney, Russ, explained the situation, and because they kept on saying they had this deed in lieu of foreclosure, Russ suggested that I just file for Chapter 11.

Q. And is that, in fact, what you did?

A. Yes.

Q. When you hired Michael Falk to find you a loan on this property, and I think you said it was Spring of '04?

A. Yes.
Q. The property was titled in Sun Peak, wasn't it?
A. I'd have to look. It could have been, yes.
Q. Isn't it also true that legal title to the home was in Sun Peak's name right up to the moment that you got this loan from Winterfox?
A. Yes.
Q. Why were you seeking a personal loan instead of a loan on behalf of Sun Peak?
A. The documentation that was put in front of me --
Q. I said why, not how.
A. Oh.
Q. Why weren't you --
A. Because it's our personal residence. It's our -- it's our home.
Q. And the documentation that you signed, the trust deed notes, were those with you personally?
A. Yes.
Q. And the trust deeds on the property, those indicated that you were the title holder, didn't it?
A. Yes.
Q. Did you ever have any discussions with anyone to the effect that the loan and trust deeds should be done in Sun Peak's name?
A. No.

Q. Today we heard testimony from Mr. Olivarez that you told him that you wanted these -- this new loan from Winterfox to pay off foreclosing liens that were incurred for business purposes. Did you hear that testimony today?

A. I heard that.

Q. Is his testimony correct?

A. No.

Q. Did you have discussions with Mr. Olivarez regarding the purpose of the loan?

A. To refinance the existing loans on the house.

Q. And did you have conversations with him about the nature of those existing loans?

A. No.

Q. None at all?

A. No. Other than the fact that it was a Washington Mutual loan, a Wells Fargo home equity line of credit, and the -- the loan -- or the judgment from Ed Ingram. Those were the three main.

Q. So you didn't have discussions with Aaron Olivarez describing the foreclosing loans as loans that were leveraged for business purposes?

A. Absolutely not.

Q. Did you have those discussions, or discussions of that type, with Michael Falk?

A. No.

Q. Your understanding, would there have been any basis for Michael Falk to represent that to Aaron Olivarez or any other party?
A. None whatsoever.
Q. Did you have any discussions with George Evan Bybee regarding the purpose of the loan or why the underlying liens -- what the purpose or what -- where those loans came from?
A. No.
Q. How about with Marco Fields?
A. No.
Q. Did you ever have discussions with any of those people, Marco Fields, Aaron Olivarez, George Bybee, or Michael Falk, indicating that this property, this home was not where you and your wife and your children live?
A. No.
Q. You say that Michael Falk had worked with you before?
A. Correct.
Q. What had he worked with you in doing?
A. Mortgages. He was a mortgage broker.
Q. For what purpose? What type of mortgages?
A. He had obtained the original -- our house was completely paid off by April of 2000, and in January 2001 we bought my wife's mother a home, and he brokered that loan.

Subsequent to that, we got the Washington Mutual loan in late November, early December 2001. He brokered that loan. He had also brokered a couple of loans prior to that in 2000 when we bought the building on 2078 Prospector, and when we bought a warehouse -- actually, no. The warehouse was owner financing, so he was not involved in that.

Q. So are you saying that Mr. Falk assisted you in a personal capacity on your home and a business capacity on other loans?

A. Yes.

Q. And Mr. Falk knew that the Bear Hollow property was your residence, didn't he?

A. He knew it was our home, yes.

Q. Do you receive mail at your residence?

A. No.

Q. Where do you receive your mail?

A. It comes to P.O. Box 77 -- 770 in Park City. From there it's delivered to the UPS Store where we have Box No. 278.

Q. Do you have an understanding of what happens to mail when it is mailed to your home address?

A. It is always returned.

Q. And how do you know that?

A. I have, over the past couple of years, asked people to mail me a letter to my home address, and they have all gotten it back. The Trustee in this case, Peter --

Q. Kevin.

A. Kevin, Kevin Bird.

Q. Well, there's Kevin Bird and there's also the United States Trustee.

A. The United States Trustee's office originally mailed mail to my home address, and they got it back as well.

Q. So if Winterfox mailed the documents to your home address, is it your testimony that you would not receive them?

A. It would have been returned to them provided that their return address was on the envelope.

Q. Let's look at Exhibits 7 and 8. These are copies of the disclosures, notices and disclosures under the Truth In Lending Act which Winterfox has testified under oath were delivered to you in -- or mailed to you in December 2004. In looking at these documents, you've seen these documents before, right?

A. Yes.

Q. Were these documents mailed to you in connection with you obtaining the loans from Winterfox?

A. No. None of -- none of these -- none of these documents here were ever mailed to me, including the ones that are stamped mailed. None of these documents were ever mailed to me.

MS. BOULEY: I'm just going to object and move to strike on the basis of foundation in terms of whether they were mailed. He testified he didn't receive them.

THE COURT: All right. I'm going to grant that motion. Can you rephrase.

MR. AFFLECK: Thank you, Your Honor.

Q. Did you receive any of these documents through the mail?

A. No.

Q. But you don't know if Winterfox mailed them or not?

A. I have no idea.

Q. Let's look at a few of these documents. Let's look at in Exhibit 7. If you turn to -- let's see. If you turn to the document labeled Winterfox No. 9, you see the bottom of the page WF 9? Are you in the right documents, sir?

A. Yes. I've got them.

Q. Okay.

A. WF.

Q. 9.

A. 9. Yep.

Q. This is the truth in lending disclosure statement for your loan, and it provides for a number of payments.

359 -- or, actually, 360 payments. Were there 360 payments?

A. No.

Q. How many were there?

A. It was to be one payoff.

Q. And it includes a finance charge of 3,600-some-odd-thousand. Did you understand that to be the finance charge?

A. No.

Q. And total payments of 4.9 million?

A. No.

Q. Almost 5,000,000?

A. No.

Q. What about the annual percentage rate? Do you know what an annual percentage rate is?

A. Yes.

Q. What is it?

A. Well, it's the percentage rate charged on the -- on the loan.

Q. And is it your understanding that the annual percentage rate of this loan was 12 percent?

A. No.

Q. Let's look at the next page, Winterfox 10. This indicates an Affidavit of Occupancy, and indicates that the property will be your primary residence. Is this correct?

A. Yes. Although, I never received this document either.

Q. Now looking at Exhibit 8, first page Winterfox 18, this is the Truth In Lending Disclosure Statement for the smaller of the loans. It indicates a number of payments, 360. Is that correct?

A. No.

Q. And a finance charge of $107,000?

A. No.

Q. Total payments of 146,000?

A. No.

Q. And 12 percent interest?

A. No.

Q. If you turn to page 22, Winterfox 22, again, here is this -- this is an Affidavit of Occupancy and it, again, indicates that the property is your primary residence. Is that correct?

A. Yes.

Q. Do you have an understanding of what the accurate APR, annual percentage rate, of the loans that you got from Winterfox was?

A. No.

Q. If I told you it was in excess of 70 percent, the first loan at least, would that surprise you?

A. I -- I would have never signed anything.

Q. Would you have looked for other loan opportunities if you had been aware of the accurate disclosure information on these loans?

A. Absolutely.

Q. Why were there two loans instead of one?

A. The title company could not get an actual payout from Wells Fargo in a timely manner. It took, I do believe, about four weeks for the girl that works there to get that payout.

Q. Did you take any cash out of the loans?

A. Where is the original --

Q. Maybe I can help you out here with a settlement statement. Take a look Exhibit 56. This document has been received into evidence. Does this refresh your recollection?

A. Yes.

Q. Okay. Did you receive any cash, did you take out any cash from these loans?

A. No.

Q. Sir, if you would look at the second page of Exhibit 56, in the closing statement, No. 808, there is a reference there. "Payoff NevWest Corp."

A. Correct.

Q. What is -- what does that refer to?

A. That's a company that I have.

THE COURT: I'm sorry. Excuse me. I'm not with you.

MR. AFFLECK: It's Exhibit 56, Your Honor.

THE COURT: And second page?

MR. AFFLECK: Second page.

THE COURT: And -- and were you referencing a Bates-stamp?

MR. AFFLECK: I'm sorry. It's item --

THE COURT: Item.

MR. AFFLECK: -- 808 in the closing statement.

THE COURT: All right.

Q. (BY MR. AFFLECK) Isn't it true that $45,000 came out of the loan proceeds?

A. Yes.

Q. In cash to NevWest?

A. Yes.

Q. What was the purpose of that payment?

A. It was a -- I think we treated it as a loan to NevWest, but I would have to ask Barbara Smith, my accountant, exactly how she treated that for that year.

Q. Okay. What was this $45,000 to NevWest used for?

A. Actually, within a couple of days I spent 22,000 of it to purchase a 2004 -- a second -- a used 2004 Jeep Wrangler.

Q. And did you purchase that in your own name or in NevWest's name?

A. In my own name and my wife's name.

Q. What -- what is NevWest?
A. NevWest is a company that I have that I run my consulting business through.
Q. Okay. Out of, like, Heritage Prescott? It's a it's a business that you --
A. Develop other businesses in.
Q. Okay. Did you use money from this NevWest cash to assist you in taking a company public?
A. No.
Q. Or for other business ventures?
A. No.
Q. Aside from this $45,000, was there any other money that was taken out in the form of cash?
A. Not that I'm aware of, no.
Q. Now, you had several liens against this property in December 2004, didn't you?
A. Yes.
Q. We've discussed the Ed Ingram mechanic's lien, the Washington Mutual loan trust deed.
A. Yes.
Q. And the Wells Fargo loan which, I think, was a --
A. Home equity line of credit.
Q. -- home equity line of credit. Now, there were some other liens too --
A. Yes.

Q. -- weren't there? And those liens, I'll represent to you, are part of the stipulated facts in this record that are contained in the Pre-Trial Order at paragraph 33. One of those liens was for Utah -- it was a Utah Mortgage Center lien for $50,000. Was that loan -- and I'll represent to you the Trustee has stipulated that that loan is -- was for business purposes. There was another loan for a lien for LaVon Kashkarian and Max VonApp. You described that earlier today in your testimony, right?

A. Yes.

Q. And that was a business-related obligation, wasn't it?

A. Yes.

Q. And there were a couple of Tax Commission liens as well. One for $8,270.43, and one for income taxes relating to Laurie Kitts for $28,482.87.

A. Correct.

Q. Do you know why there was a tax lien for Laurie's taxes on the property?

A. Her personal income tax.

Q. And why would that lien be on this property?

A. Because it was our home.

Q. Even though it was titled in Sun Peak's name?

A. Correct.

Q. And the Tax Commission lien, what was that for?

A. That was, if I'm not mistaken, state tax, and it might have been mine. It was either mine or Laurie's. One or the other.

Q. So these liens totaled $50,000. Utah Mortgage Center, LaVon Kashkarian, $22,500, Utah Tax Commission, $8,270.43, and the lien for Laurie's income taxes, $28,482.87. And I'll represent to you that those are all stipulated facts, sir. Were any of these liens that I've just described in foreclosure at the time of the Winterfox/Kitts loan?

A. Were any what?

Q. Were any of the liens that I've just described in the process of foreclosure when you got the loan from Winterfox?

A. No.

THE COURT: Mr. Affleck, is this a good point to break?

MR. AFFLECK: It would be, Your Honor. Thank you.

THE COURT: All right. We'll be in recess.

(Proceedings adjourned at 4:58 p.m.)

* * * * *

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

REPORTER'S CERTIFICATE

I, Amanda Richards, court approved transcriber, certify that;

The foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

Amanda Richards 2/16/10

Amanda Richards, CSR Date